FILED

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OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OSCAR DIAZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR CERTIORARI REVIEW

On Petition for Certiorari to the United States Court of Appeals for the Eleventh Circuit

RHONDA A. ANDERSON, ESQ.
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing was mailed *via* U.S. Mail, this 29th day of May, 2001, to: ***Solicitor General,*** Department of Justice, 10th and Constitution Avenue, N.W., Washington, D.C. 20530; and ***Madeleine R. Shirley, Esq.,*** Assistant U. S. Attorney, Chief-Appellate Division, Office of the U. S. Attorney, 99 N.E. Fourth Street, Miami, Florida 33132.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 99-00303 CR-UNGARO-BENAGES
MAGISTRATE JUDGE BROWN
21 USC 846
21 USC 841(a)(a)
18 USC 2
21 USC 853

UNITED STATES OF AMERICA

v.

RAFAEL CHAVARRY, JR.,
RAFAEL FERNANDO BARRETO,
RAFAEL CALISTO MORALES
and
OSCAR DIAZ

_____/

INDICTMENT

The Grand Jury charges that:

COUNT I

On or about April 15, 1999, in Miami-Dade County, in the Southern District of Florida, the defendants,

RAFAEL CHAVARRY, JR.,
RAFAEL FERNANDO BARRETO,
RAFAEL CALISTO MORALES
and
OSCAR DIAZ,

did knowingly and intentionally combine, conspire, confederate and agree with each other and others unknown to the Grand Jury, to possess with intent to distribute a Schedule II controlled substance, that is, a mixture and substance containing a detectable amount of cocaine, in violation of Title 21, United States Code, Section 841(a)(1); all in violation of Title 21, United States Code, Section 846.

COUNT II

On or about April 15, 1999, in Miami-Dade County, in the Southern District of Florida, the defendants,

RAFAEL CHAVARRY, JR.,
RAFAEL FERNANDO BARRETO,
RAFAEL CALISTO MORALES
and
OSCAR DIAZ,

did knowingly and intentionally possess with intent to distribute a Schedule II controlled substance, that is, a mixture and substance containing a detectable amount of cocaine; in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

FORFEITURE

As a result of the felony offenses alleged in Counts I and II of this Indictment, the United States is entitled to forfeiture of, and the defendants, RAFAEL CHAVARRY, JR., RAFAEL FERNANDO

BARRETO, RAFAEL CALISTO MORALES and OSCAR DIAZ, shall forfeit to the United States any property constituting and derived from any proceeds the defendants obtained, directly or indirectly, as the result of such violations, and property used and intended to be used, in any manner or part, to commit and to facilitate the commission of said violations, including fifty-two thousand dollars ($52,000.00) in United States currency, recovered from defendant RAFAEL CHAVARRY, JR., on April 15, 1999; pursuant to Title 21, United States Code, Section 853.

A TRUE BILL

_____

FOREPERSON

_____

THOMAS E. SCOTT
UNITED STATES ATTORNEY

_____

LOIS FOSTER-STEERS
ASSISTANT UNITED STATES ATTORNEY

August 23, 1999

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

v.

OSCAR DIAZ,

RHONDA A. ANDERSON,
ESQ. Defendant's Attorney
Case No.: 1:99CR00303-001

JUDGMENT IN A CRIMINAL CASE
(For offenses Committed On or After November 1, 1987)

THE DEFENDANT:

- ☐ pleaded guilty to count(s) __.
- ☐ pleaded nolo contendere to count(s)___which was accepted by the court.
- ☒ was found guilty on count(s) One and Two after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count No.(s)
21 USC§846	Conspiracy to Possess With Intent to Distribute Cocaine	04/15/1999	One
21 USC§841	Possession with Intent to Distribute Cocaine	04/15/1999	Two

The defendant is sentenced as provided in pages 2 through 6 of the judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)__.

☒ Count(s) all remaining counts are dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Social Security No.: 264-67-4899
Defendant's Date of Birth: 07/18/1963
Defendant's U.S.M. No.: 59372-004
Defendant's Residence Address:
Miami Federal Detention
Miami, FL 33128
Defendant's Mailing Address: Same
Miami Federal Detention
Miami, FL 33128
Date of Imposition of Judgment: 11/05/99

_____
Signature of Judicial Officer
Ursula Ungaro-Benages
U.S. District Judge

11/5/99
Date

Defendant: **OSCAR DIAZ**
Case Number: **1:99CR00303-001**

IMPRISONMENT

THE defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total **term** of **240 month(s)**

☒ The court makes the following recommendations to the Bureau of prisons:

The Court Orders that the defendant be placed in facility with the highest level of Drug treatment which may include the Triade Drug treatment Program where the defendant is considered for release into a half way house one year before his scheduled release date.

The Court also recommends that the defendant be placed in a South

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

- ☐ at ___ a.m./p.m. on _____.
- ☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

- ☐ before 2 p.m. on ___.

- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on ___ to _____ at _____ with a certified copy of this judgment.

UNITED STATES MARSHAL

By_____

Deputy U.S. Marshal

Defendant: **OSCAR DIAZ**
Case Number: **1:99CR00303-001**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **10 years.**

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:
The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable)

☒ **The defendant shall not possess a firearm as defined in 18 USC § 921.** (Check, if applicable)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such time or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of

Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if applicable).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the prob. officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons

engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the prob. officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

AO 245B(Rev. 8/96)Judgment in a Criminal Case: Sheet 5, Part A-Criminal Monetary Penalties

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Defendant: **OSCAR DIAZ**
Case Number: **1:99CR00303-001**

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payment set forth on Sheet 5, Part B.

	Assessment	**Fine**	**Restitution**
Totals:	$200.00		

☐ If applicable, restitution amount ordered pursuant to plea agreement. $

FINE

The above fine includes costs of incarceration and/or supervision in the amount of _____.

The defendant shall pay interest on any fine more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

☐ The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ The interest requirement is waived.

☐ The interest requirement is modified as follows:

RESTITUTION

☐ The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case will be entered after such a determination.

☐ The defendant shall make restitution to the following payees in the amounts listed below:

** If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee(s)	***Total Amount of**	**Priority Order or of % of Payment**
TOTALS:	$	$

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

AO 245B(Rev. 8/96)Judgment in a Criminal Case: Sheet 5, Part B-Schedule of Payments

Defendant: **OSCAR DIAZ**
Case Number: **1:99CR00303-001**

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessments; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

☒ In full immediately; or

☐ $___ immediately, balance due (in accordance with the following): or

☐ not later than____; or

☐ in installments to commence ___ days after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

☐ in ___ (e.g., equal, weekly, monthly, quarterly) installments of $__ over a period of ___ year(s) to commence ___ days after the date of this judgment.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal

monetary penalties:

- ☐ Joint and Several:
- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall **forfeit** the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prison's Inmate Financial Responsibility Program are to be made as directed by the court, the probation officer, or the United States attorney.

Defendant: **OSCAR DIAZ**
Case Number: **1:99CR00303-001**

STATEMENT OF REASONS

☒ The court adopts the factual findings and guideline application in the presentence report.

OR

☐ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense level: 32

Criminal History Category: III

Imprisonment Range: 240 due to enhancement 21 USC 851

Fine Range: $17,500.00 to $16,000,000.00

☐ Fine waived or below the guideline range because of inability to pay.

Total amount of Restitution: $0

☐ Restitution is not ordered because of the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order out weighs the need to provide restitution to any victims, pursuant to 18 U.S.C. §3663(d).

☐ For offenses committed on or after September 13, 1994, but before April 23, 1996 that require

the total amount of loss to be states, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

☐ Partial restitution is ordered for the following reason(s):

☒ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

☒ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons:

The court will impose a sentence at the low end of the guidelines range in consideration of the defendant's age.

OR

☐ The sentence **departs** from the guideline range:

☐ upon motion of the government, as a result of defendant's substantial assistance, pursuant to 5K1.1

☐ for the following specific reason(s):

[DO NOT PUBLISH]
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-15009
Non-Argument Calendar

D.C. Docket No. 99-00303-CR-UUB

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

OSCAR DIAZ,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(January 11, 2001)

Before BIRCH, BARKETT and HULL, Circuit Judges.

PER CURIAM:

Oscar Diaz ("Diaz") appeals his conviction and 240-month sentence for conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. §846, and possession with intent to distribute cocaine, in violation of 21 U.S.C. §841(a)(1). He argues that: (1) there was insufficient evidence to support his convictions; (2) the district court improperly restricted cross-examination of a government witness; (3) the district court improperly refused to instruct the jury on his "theory of defense"; (4) the district court erred at sentencing when it determined the amount of cocaine attributable to him; and (5) the district court erred at sentencing when it found that it lacked authority to depart downward.

After review, we affirm.

I. BACKGROUND

The South Broward Drug Enforcement Unit ("DEU")[1] conducted surveillance of a house in southwest Miami-Dade County and a Toyota Tercel parked outside the house. Officers observed Diaz drive his Toyota Tercel to two different houses in southwest Miami-Dade County. The second house belonged to coconspirator Rafael Morales ("Morales"). Diaz and Morales spoke briefly behind the gated entrance to Morales' house with coconspirator Rafael Barreto ("Barreto"). After this brief meeting, Morales and Barreto, driving in Morales' black Acura, followed Diaz, driving in his Toyota Tercel, to a nearby shopping center.

At the shopping center, Diaz parked his car and walked toward the black Acura. Morales and Barreto got out of the black Acura and briefly conversed with Diaz. After the conversation, Diaz and Barreto went to public pay phones while Morales sat on the curb. During that time, Diaz and Barreto each made several

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[1] The DEU is a multi-agency task force comprised of both federal law enforcement officers from the Drug Enforcement Administration ("DEA"), United States Customs Service, Federal Bureau of Investigation ("FBI"), Border Patrol, and local law enforcement officers from Hallandale, Miramar, Davie, and Cooper City, Florida. The unit focuses on drug and money laundering cases. The DEU's investigation in this case was part of an ongoing investigation of narcotic distribution in the South Florida area.

phone calls and frequently looked at their pagers. At one point, Diaz left for approximately twenty minutes to go to a bakery inside the shopping center, while Morales and Barreto remained outside and talked to each other. Once Diaz returned, Morales received a page on his pager and showed his pager to Diaz. All three men went to a pay telephone and Morales placed a brief call. After the call, the three men walked together to the black Acura. Diaz left his Toyota Tercel at the shopping center and returned with Morales and Barreto to Morales' house in the black Acura.

Officers then followed the black Acura back to Morales' house where Diaz, Morales, and Barreto only stayed inside for about three to four minutes. Diaz, Morales, and Barreto returned to the black Acura and drove to a second shopping center. They circled the parking lot until they saw coconspirator Raphael Chavarry ("Chavarry") waving to them from a white Chevrolet Blazer. Morales, Diaz, and Barreto drove up next to the white Chevrolet Blazer and met briefly with Chavarry.

Thereafter, Diaz, Morales, and Barreto returned to the black Acura and left the parking lot. Chavarry followed the black Acura to Barreto's apartment complex. Diaz, Morales, Barreto, and Chavarry walked up to Barreto's second floor apartment carrying no bags. Approximately ten to fifteen minutes later, Chavarry left the apartment carrying a black duffel bag over his shoulder and a small floral-print bag in his hand. Chavarry then placed the two bags in his Chevrolet Blazer.

Before Chavarry drove away, DEU officers approached Chavarry and asked him what were in the two bags. Chavarry told DEU officers that the bags contained cocaine. Based on this information, DEU

officers searched the two bags, finding approximately seven kilograms of cocaine and $15,800. At that point, the officer placed Chavarry under arrest and searched his person, finding an additional $3,499. A further search of the Chevrolet Blazer revealed an additional $38,980 stashed in the vehicle's center console.

Meanwhile, several DEU officers went upstairs to the second floor apartment and saw Barreto, the lessee of the apartment, leaving the front door. DEU officer Okamoto and another officer, walked with Barreto toward a wall outside the apartment and identified themselves as police officers. At that time, someone inside the apartment slammed and locked the front door. The officers heard scuffling inside the apartment and someone yelling "police" and "policia." DEU officers than observed Morales drop a plastic bag off the second floor balcony of the apartment building and attempt to jump from that balcony. DEU officers scaled the side of the building to the second floor balcony and arrested Morales. The plastic bag was recovered and determined to contain cocaine. Diaz jumped from the same second floor balcony and ran for approximately 100 yards, before being apprehended by DEU officers.

Officer Okamoto and other DEU officers entered the relatively small apartment and conducted a security sweep. One officer saw cocaine, in plain view in an open shoe box on the kitchen counter. In the open kitchen cabinets, officers saw several 1" x 1" plastic bags, additional cocaine, and a sifter used for sifting cocaine. Officers saw cocaine, also in plain view, in the two bathrooms in a space created by removing the vanity mirrors from the wall in both bathrooms. The doors to both bathrooms and the master bedroom were open.

In a subsequent search of the apartment, agents

seized cocaine from the kitchen, both bathrooms, and master bedroom. Furthermore, agents found a lease agreement on the floor of the master bedroom closet, which showed that Barreto had lease the apartment. Agents found two cellular telephones in the apartment, one with the name "Oscar"--Diaz's first name--displayed on the screen. Call records for each telephone showed that calls were made from each telephone to the other prior to their arrival at the apartment. The total weight of the cocaine seized from the apartment, the black bag placed in Chavarry's automobile, and the plastic bag dropped from Barreto's second floor apartment balcony was approximately fourteen kilograms.

II. PROCEDURAL HISTORY

On April 23, 1999, a federal grand jury issued an indictment against Diaz, Barreto, Morales, and Chavarry, charging them with one count of conspiracy with intent to distribute cocaine, in violation of 21 U.S.C. §§846 and 841(a)(1), and one count of possession with intent to distribute cocaine, in violation of 21 U.S.C. §941(a)(1). Diaz pleaded not guilty. Barreto, Morales, and Chavarry entered guilty pleas prior to trial. The government filed a pretrial notice of information of one of Diaz's prior felony narcotics convictions to support a mandatory sentencing enhancement under 21 U.S.C. §841(b)(1)(A)(ii)(II). After a four-day trial, the jury found Diaz guilty on both counts of the indictment. Diaz then filed a motion for a new trial, which was denied after a hearing by the district court.

Diaz filed a motion for a downward departure arguing that his prior criminal convictions over-represented his criminal history and that other personal matters warranted a departure. The government opposed the motion, asserting that the district court

lacked authority to grant a downward departure from the statutorily-mandated sentence. At the sentencing hearing, the district court found that it lacked authority to grant Diaz's request for a downward departure and sentenced him to a statutory mandatory 20 years' imprisonment, pursuant to 21 U.S.C. §841(b)(1)(A)(ii)(II), to be followed by 10 years' supervised release. Diaz objected and timely filed this appeal.

III. DISCUSSION

A. Sufficiency of the Evidence

Diaz asserts that the evidence was insufficient to support his conviction on both counts of the indictment. We review de novo sufficiency of the evidence claims. See United States v. Starrett, 55 F.3d 1525, 1552 (11th Cir. 1995). We view all evidence in the light most favorable to the government and draw all reasonable inferences and credibility determinations in favor of the government. See id. A conviction must be upheld unless the jury could not have found the defendant guilty under any reasonable construction of the evidence. See United States v. Camargo-Vergara, 57 F.3d 993, 997 (11th Cir. 1995).

1.Conspiracy with the Intent to Distribute Cocaine

To support a conviction for conspiracy with the intent to distribute cocaine, the government must prove beyond a reasonable doubt that a conspiracy existed between two or more persons, (2) that the defendant knew of the conspiracy, and (3) the defendant knowingly and voluntarily participated in the conspiracy. See United States v. Andrews, 953 F.2d 1312, 1318 (11th Cir. 1992). The government need not prove that the defendant had knowledge of all details or phases of a conspiracy, but only that the defendant knew the essential nature of the conspiracy. See id.

"Thus, a defendant may be guilty of conspiracy even if he or she joined it midway, or played only a minor role in the total scheme." Id.; United States v. Freeman, 660 F.2d 1030, 1035 n.1 (5th Cir. Unit B Nov. 1981)(holding that, although mere presence is inadequate to establish guilt, "it is material, highly probative, and not to be discounted").

A conspiracy may be proven by either direct or circumstantial evidence. If circumstantial evidence is relied on, "reasonable inferences, and not mere speculation, must support the jury's verdict." United States v. Brazel, 102 F.3d 1120, 1131 (11th Cir. 1999)(citing United States v. Lopez-Ramirez, 68 F.3d 438, 440 (11th Cir. 1995)). Close association with a coconspirator or "mere presence" at the scene of crime is insufficient evidence of knowing participation in a conspiracy. See Andrews, 953 F.2d at 1318. Knowing participation may be established through proof of surrounding circumstances such as acts committed by the defendant which further the purpose of the conspiracy. See id. A defendant may be culpable even if he or she played a minor role in the conspiracy, because a conspirator need not know the details of each act making up the conspiracy. See Brazel, 102 F.3d at 1131.

After review, we conclude that the evidence of Diaz's activities considered was clearly sufficient to support his conviction for conspiracy with intent to distribute cocaine. Indeed, Diaz's activities were totally consistent with the government's charge that Diaz, Barreto, and Morales were involved in a drug transaction, or at a minimum drug distribution, with Chavarry. Considering the evidence in the light most favorable to the government, Diaz: (1) first met with Barreto and Morales; (2) then led Morales and Barreto

to the first shopping center to use pay telephones away from Diaz's and Morales' residences; (3) consulted with Morales about pages they received; (4) traveled with Morales and Barreto to a second shopping center to meet Chavarry; (5) then went to the cocaine stash apartment nearby with Chavarry following him; (6) had Chavarry enter the apartment with them and then watch Chavarry leave with seven kilograms of cocaine; (7) being in an apartment that was essentially used as a cocaine stash house with an open box of cocaine on the kitchen counter, kilograms of cocaine visible in the bathrooms, more cocaine in the kitchen and bedroom, and cocaine weighing, sifting, and packaging equipment; and (8) unsuccessfully trying to flee from police after they had stopped Barreto outside the apartment. While each fact alone is not sufficient, the facts considered together are more than sufficient to support Diaz's conviction.

Given the evidence, a jury could reasonably determine that Diaz's activities at the two parking lots went beyond "mere presence" and were not coincidental to the conspiracy. Indeed, Diaz's activities far exceeded the activities of other defendants whose conspiracy convictions were upheld by this Court. See United States v. Gutierrez, 931 F.2d 1482, 1487 (11th Cir. 1991) (upholding a conspiracy conviction for a coconspirator whose activity was limited to "looking around" in two parking lots and fleeing from a second parking lot in his vehicle).

The facts in this case, and acts of Diaz, go well beyond the acts of those in each of the cases upon which Diaz relies. For example, Diaz relies on United States v. Hernandez, 896 F.2d 513 (11th Cir. 1990), where this Court found that the evidence against one defendant was insufficient to support his conviction

under 21 U.S.C. §846. See id. at 519-20. In Hernandez, (1) the defendant was present in a codefendant's car when the codefendant delivered a package to an undercover officer; (2) the defendant walked away after catching the undercover officer's eye; (3) the defendant talked into a "dead" telephone at a nearby Burger King after walking from the site of the transaction; and (4) the defendant had a prior cocaine possession conviction. See id. In concluding that the evidence was insufficient to prove the conspiracy and possession with intent to distribute charges, this Court was persuaded by the fact that all the activity involving the defendant occurred in the few minutes between arrival of the coconspirator's car and the defendant's departure when the package was given to the undercover officer. See id.

Unlike the defendant in Hernandez, Diaz was not merely fortuitously present with his coconspirators for a brief period of time at one location. Diaz was with the coconspirators for several hours, traveled with them to various locations, and willfully participated in suspicious behaviors with them. Furthermore, unlike the cocaine concealed in a bag in Hernandez, some cocaine in this case was openly visible while Diaz was inside the apartment. Moreover, unlike the defendant in Hernandez, Diaz was an active participant by using pay telephones at a shopping center to return pages, rather than using his home telephone, Morales' home telephone, or his or Morales' cellular telephones--an act clearly made in an attempt to avoid eavesdropping or wiretapping of their telephone conversations immediately prior to the cocaine transaction with Chavarry. Finally, Diaz's flight from the police was obvious. In contrast, it was unclear in Hernandez whether the defendant was fleeing as he only walked

away from the undercover officer because he did not run and there was no indication that he was aware that the undercover officer was, in fact, a police officer.[2]

Viewing all evidence in the light most favorable to the government, with all reasonable inferences weighed in favor of Diaz's guilt, Diaz's actions during the hours prior to the drug transaction and at Barreto's apartment complex, when viewed together, sufficiently demonstrate his participation and agreement in the cocaine possession conspiracy.

2.Possession with Intent to Distribute Cocaine

Diaz also asserts that the evidence was insufficient to support his conviction for possession with intent to distribute cocaine. To prove possession with intent to distribute cocaine, the government must prove three elements by either direct or circumstantial evidence: (1) knowledge of one's possession; (2) actual or

---

[2]Diaz also argues that his convictions should be reversed based on this Court's decisions in United States v. Jenkins, 779 F.2d 606 (11th Cir. 1986) and United States v. Kelly, 749 F.2d 1541 (11th Cir. 1985). Unlike Jenkins and Kelly, where the defendants were "merely present" during a drug transaction, Diaz's activities go well beyond mere presence. For several reasons articulated in our distinguishing of the facts in Hernandez, and after viewing the facts in the light most favorable to the government, we find that the evidence supports the government's position that Diaz was an active participant in the drug transaction, or at least drug distribution, with Chavarry.

constructive possession of a controlled substance; and (3) intent to distribute that substance. See 21 U.S.C. §841(a)(1); United States v. Cooper, 203 F.3d 1279, 1286 (11th Cir. 2000); United States v. Wilson, 183 F.3d 1291, 1298-99 n.13 (11th Cir. 1999). Constructive possession is proven "'by showing ownership or dominion and control over the premises on which the drugs are concealed.'" United States v. Gamboa, 166 F.3d 1327, 1331 (11th Cir. 1999)(quoting United States v. Hernandez, 896 F.2d 513, 520 (11th Cir. 1990)).

However, a defendant can be found vicariously liable of possession of cocaine by a coconspirator even without evidence of his own actual or constructive possession. See Pinkerton v. United States, 328 U.S. 640, 647-48 (1946)(holding that a defendant found guilty of a conspiracy offense may be found guilty of the substantive offense to the conspiracy, even though he, the defendant, did no more than join the conspiracy); see also United States v. Mothersill, 87 F.3d 1214, 1218 (11th Cir. 1996)("Each party to a continuing conspiracy may be vicariously liable for substantive criminal offenses committed by a co-conspirator during the course and in furtherance of the conspiracy, notwithstanding the party's non-participation in the offenses or lack of knowledge thereof."); United States v. Gallo, 48 F.3d 502, 504 (11th Cir. 1995). Therefore, we need not reach the question of whether Diaz had possession, actual or constructive, of the seized cocaine because, even without this evidence, he may still be found liable of the possession of cocaine charge on vicarious liability grounds under Pinkerton.

These elements are required in order to be held vicariously liable under Pinkerton for a substantive offense of a coconspirator, such as possession of

cocaine with the intent to distribute: (1) there must be proof of a conspiracy of which the defendant charged is a member; (2) the substantive offense committed by a coconspirator must have been in furtherance of the conspiracy and fell within its scope; and (3) the substantive offense must have been reasonably foreseeable as a natural and probable consequence of the unlawful agreement. See United States v. Clavis, 956 F.2d 1079, 1087 (11th Cir. 1992)(citing Pinkerton, 328 U.S. at 647-48).[3]

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[3]The district court in this case instructed the jury concerning both vicarious liability and aiding and abetting:

The guilt of a defendant in a criminal case may be proved without evidence that he personally did every act involved in the commission of the crime charged. The law recognizes that, ordinarily, anything a person can do for himself may also be accomplished through direction of another person as an agent, or by acting together with, or under the direction of, another person or persons in a joint effort.

So, if the acts or conduct of an agent, employee or other associate of the defendant are willfully directed or authorized by the defendant, or if the defendant aids and abets another person by willfully joining together with that person in the commission of a crime, then the law holds the defendant responsible for the conduct of that other person just as though the defendant had engaged in such conduct himself.

However, before any defendant can be held

As discussed above, the evidence was sufficient to support the conclusion that Diaz willfully participated in a drug conspiracy with Chavarry, Barreto, and Morales. Coconspirator Chavarry was found in possession of seven kilograms of cocaine-enough evidence to constitute the substantive offense under 21 U.S.C. §841(a)(1)-shortly after leaving coconspirator Barreto's apartment. Furthermore, viewing the evidence in the light most favorable to the government, Diaz led Chavarry to Barreto's apartment, which was used as a stash house for the cocaine transferred to Chavarry. Based on all of this and the evidence detailed above, it is reasonable to conclude that the cocaine found in the apartment and in the bag placed in Chavarry's Chevrolet Blazer was part of the action taken in furtherance of a conspiracy involving Diaz, Chavarry, Barreto, and Morales, and that the possession of that cocaine could be foreseen as a natural and probable consequence of the unlawful agreement between these coconspirators. Accordingly, this evidence cumulatively was sufficient to support Diaz's conviction for possession with intent to distribute cocaine.

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criminally responsible for the conduct of others, it is necessary that the defendant willfully associate himself in some way with the crime, and willfully participate in it. Mere presence at the scene of a crime and even knowledge that a crime is being committed are not sufficient to establish that a defendant either directed or aided and abetted the crime. You must find beyond a reasonable doubt that the defendant was a willful participant and not a merely knowing spectator.

Alternatively, even disregarding the Pinkerton analysis, we find that the government's evidence supports a reasonable conclusion by the jury that Diaz willfully aided and abetted his coconspirators in the possession with the intent to distribute cocaine. To prove aiding and abetting, the government must show the following: (1) that a substantive offense was committed; (2) the defendant associated himself with the criminal venture; and (3) the defendant committed some act which furthered the crime. See Bazemore v. United States, 138 F.3d 947, 949 (11th Cir. 1998); 18 U.S.C. §2. Because the evidence was sufficient to show that Diaz aided and abetted the drug transaction, Diaz is punishable as a principal actor in that transaction. See 18 U.S.C. §2(a).[4]

C. The District Court's Limitation of Cross-

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[4]Title 18, of the United States Code, Section 2 provides, in relevant part, that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." 18 U.S.C. §2(a).

Count two of the indictment of Diaz specifically refers to this aiding and abetting statute as follows:

> Oscar Diaz, did knowingly and intentionally possess with intent to distribute a Schedule II controlled substance, that is, a mixture and substance containing a detectable amount of cocaine; in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

Examination of a Government Witness

Diaz asserts that the district court improperly limited his cross-examination of Detective Okamoto. Diaz claims that restriction of the cross-examination of Detective Okamoto led to the exclusion of "exculpatory facts" that violated his Fifth and Sixth Amendment right to a fair trial.[5] We review limitations on the scope and extent of cross-examinations for an abuse of discretion. See United States v. Matthews, 168 F.3d 1234, 1244 (11th Cir. 1999). Even where an abuse of discretion occurs, non-constitutional evidentiary errors do not warrant reversal absent a showing that the defendant's substantial rights were affected. See United States v. Sellers, 906 F.2d 597, 601 (11th Cir. 1990). After careful review of the trial transcripts, it is clear that the district court did not abuse its discretion by limiting the cross-examination of Detective Okamoto. Detective Okamoto testified to: (1) his participation in the surveillance; (2) his encounter with Barreto outside of the apartment; and (3) his participation in a security sweep of the apartment. On direct examination, the government did not question Detective Okamoto on what he saw within the apartment during the security sweep.

On cross-examination, defense counsel attempted to widen the scope of the inquiry to include whether

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[5]Diaz contends that cocaine was not in plain view in Barreto's apartment. The color photos attached to Diaz's brief support the DEU officers' testimony that the cocaine was in plain view in the kitchen and both bathrooms.

Detective Okamoto saw cocaine during the security sweep. The government objected and the district court sustained the objection on the grounds that the cross-examination was beyond the scope of the direct examination. "Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination." Fed.R.Evid. 611(b). The district court was clearly within its discretion to limit the scope of cross-examination as being beyond the scope of direct examination and, therefore, Diaz's argument is without merit.

In any event, Diaz did not object to the court's ruling limiting the cross-examination to the scope of Detective Okamoto's direct examination. Furthermore, Diaz never made a proffer of what he sought to elicit from Detective Okamoto or why the questions were relevant to Detective Okamoto's testimony. In addition, Diaz never called Detective Okamoto as a witness himself in order to inquire into areas which were beyond the scope of his direct testimony. If Detective Okamoto possessed exculpatory testimony, Diaz could have presented it.

D. The District Court's Refusal to Give a "Theory of Defense" Instruction

Diaz contends that the district court committed reversible error by refusing to give a specific and separate jury instruction on his "mere presence theory of defense." Diaz's proposed instruction is not in the trial record, but Diaz claims the proposed instruction was the one used in United States v. Lyons, 53 F.3d 1198, 1202

(11th Cir. 1995).[6] The record does show that defense counsel asked for an instruction similar to that in Lyons.

We review a district court's refusal to give a requested jury instruction for abuse of discretion. See United States v. Chastain, 198 F.3d 1338, 1350 (11th Cir. 1999). A district court's refusal to give a requested jury instruction warrants reversal only if the requested instruction: (1) was a correct statement of law; (2) was not substantially covered by the charge actually given; and (3) dealt with some point in the trial so important that failure to give the instruction seriously impaired the defendant's ability to conduct his defense. See id.; Lyons, 53 F.3d at 1200. Thus, this Court will reverse only when it is left with "a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations." United States v. Grigsby, 111 F.3d 806, 813 (11th Cir. 1997).

After careful review of the transcripts, we find that the district court did not abuse its discretion by refusing Diaz's requested instruction. The district court actually proposed adding this sentence to the standard instructions: "In this case Mr. Diaz, or the defendant, asserts that he was merely present." Diaz, however, did not accept the court's offer to add this sentence.

In any event, the jury instructions which the court gave clearly explained that "mere presence" is insufficient to find an individual guilty of conspiracy.

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[6]That instruction states that "even though [the defendants] may have been knowing spectators [during the drug transaction,] they are not guilty." Lyons, 53 F.3d at 1202.

The jury instructions also stated that "knowledge that a crime is being committed [is] not sufficient to establish that a defendant either directed or aided and abetted the crime," and that the jury was required to find "beyond a reasonable doubt that the defendant was a willful participant and not merely a knowing spectator." The district court explained:

I'm not going to give a theory of defense instruction that's covered by the instructions already. But I am willing to, if you'd like, add something on or modify the standard instruction in some way that emphasizes that this is what you're relying on in order to seek an acquittal in the case. It's already in the instructions twice. I don't know why to put it three times.

We find that Diaz's requested jury instruction was substantially covered by the charge actually given to the jury and that failure to give that instruction does not merit reversal. See Chastain, 198 F.3d at 1350. Furthermore, we find that the jury was fully and properly guided in its deliberations by the instructions it was given by the district court. United States v. Grigsby, 111 F.3d 806, 813 (11th Cir. 1997).

E. Drug Quantity Attributed to Diaz During Sentencing

Diaz argues that the district court erred in finding him responsible for the total amount of cocaine seized. He asserts that the cocaine found in the apartment and the duffle bag carried by Chavarry were not in plain view, and, therefore, it was not reasonably foreseeable to Diaz that fourteen kilograms of cocaine were involved.

We review a district court's determination of drug quantity attributable to a defendant during sentencing for clear error. See United States v. Robinson, 935 F.2d 201, 205 (11th Cir. 1991). The district court must

consider all "relevant conduct" when determining the quantity of drugs attributable to the defendant. U.S.S.G. §1B1.3. Where the defendant has participated in jointly undertaken criminal activity, relevant conduct also includes all reasonable foreseeable acts and omissions of others in furtherance of the jointly undertaken activity. See United States v. Ismond, 993 F.3d 1498, 1499 (11th Cir. 1993)(holding that a district court must make individualized findings concerning the scope of criminal activity undertaken by a particular defendant and determine the quantity reasonably foreseeable in connection with that defendant's level of participation in the conspiracy).

After careful review, we find that the record supports the district court's individualized finding that Diaz was accountable for fourteen kilograms of cocaine. In sum, the entire amount of cocaine was reasonably foreseeable to Diaz because, the apartment in which it was stashed was relatively small, there were large unconcealed quantities of cocaine located throughout the apartment, and no attempt was made to hind the cocaine from Diaz. This evidence, along with the evidence of Diaz's actions that day, tend to prove that Diaz was a trusted member of the conspiracy and had knowledge of both the cocaine that was located throughout the apartment and the cocaine obtained by Chavarry while in the apartment.

F. The District Court's Refusal to Grant a Downward Departure During Sentencing

Diaz also argues that the district court erred in refusing to grant his request for downward departure in sentencing him. The district court determined that it did not have the authority to depart downward. A defendant may not appeal a district court's discretionary refusal to depart downward. See United States v.

Gilbert, 138 F.3d 1371, 1373 (11th Cir. 1998). However, this Court may review de novo whether the district court had authority to depart if the refusal to depart was based on the district court's perceived lack of authority. See id. Section §841(b)(1)(A)(ii)(II) mandates a mandatory minimum sentence of not less than twenty years for any person who has a prior felony drug conviction and who commits a violation of 21 U.S.C. §841(a) involving five kilograms or more of cocaine. See 21 U.S.C. §841(b)(1)(A)(ii)(II).

In the present case, Diaz was convicted of possession with intent to distribute cocaine, in violation of §841(a), and he had prior convictions for possession of cocaine and purchase of cocaine. The district court properly determined that the statutory mandatory minimum sentence provisions of §841(b)(1)(A)(ii)(II) applied to Diaz's sentence, and that it did not have the discretion to depart from §841(B)(1)(A)(ii)(II).

In United States v. Simpson, 228 F.3d 1294, 1302-04 (11th Cir. 2000), this Court determined that a district court has no discretion to depart downward from a statutory mandatory minimum sentence, except in these two circumstances: (1) when the government files a motion to recognize the defendant's "substantial assistance" in the investigation or prosecution of another person, or (2) when the defendant falls within the provisions of the "safety valve" embodied in 18 U.S.C. §3553(f). See id. at 1304. Unless one or both of these exceptions exist, a district court does not have the discretion to downward depart. See id.

Here, the government did not file a substantial assistance motion. Nor did Diaz fall under the "safety valve" exception stated in 18 U.S.C. § 3553(f) which requires, among other things, that a defendant not have more than one criminal history point. Diaz had several

prior convictions, and thus five criminal-history points.

Therefore, we find that the district court was bound to impose the statutorily authorized mandatory minimum sentence of 240 months' imprisonment for Diaz's drug convictions and had no discretion to depart downward from 21 U.S.C. S841(b)(1)(A)(ii)(II).

IV. CONCLUSION

For the foregoing reasons, Diaz's convictions and sentence are hereby

AFFIRMED.

CASE NO. 99-15009-GG

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee/Plaintiff,
vs.
OSCAR DIAZ,
Appellants/Defendants.

On Appeal From The United States District Court
For The Southern District of Florida,
Miami Division, Criminal Division
Case No. 99-303-Cr-Ungaro-Benages

PETITION FOR REHEARING OF APPELLANT, OSCAR DIAZ

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CERTIFICATE OF INTERESTED PERSONS

Undersigned counsel for the Appellant, Oscar Diaz, hereby certifies pursuant to Eleventh Circuit Rule 26-1.1 that the following is a complete list of persons and entities who have an interest in the outcome of this case:

Rhonda A. Anderson, Esq.,
Appellate Counsel for Oscar Diaz

Honorable Ted E. Banstra,
U. S. District Court Magistrate

Rafael F. Barreto, Co-Defendant

Honorable Stephen T. Brown,
U. S. District Court Magistrate

Rafael Chavarry, Jr., Co-Defendant

Honorable Robert L. Dubé,
U. S. District Court Magistrate

Lois A. Foster-Steers, Esq., Assistant U.S. Attorney

Roy J. Kahn, Esq., Trial Counsel for
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Samuel J. Rabin, Jr., Esq.,
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Thomas E. Scott, U.S. Attorney

Joan A. Silverstein, Esq., Assistant U.S. Attorney

Harry M. Solomon, Esq.,
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Harris Sperber, Esq., Trial Counsel for Rafael Chavarry

Honorable William C. Turnoff,
District Court Magistrate

Honorable Ursula Ungaro-Benages,
U. S. District Court Judge

United States of America, Appellee

_____

Rhonda A. Anderson, Esq.

CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned hereby certifies that the type size and style in this brief is 14 point Times New Roman Scalable type.

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IN LIGHT OF ***APPRENDI V. NEW JERSEY,*** 530 U.S. ___, 120 S.Ct. 2348 (2000), THIS COURT SHOULD REHEAR THE APPELLANTS' ARGUMENT REGARDING THE DISTRICT COURT'S ERROR IN ASSESSING THAT FIVE KILOGRAMS OR MORE WERE ATTRIBUTABLE TO OSCAR DIAZ, BECAUSE THE JURY MUST DETERMINE THE QUANTITY OF COCAINE BEYOND A REASONABLE DOUBT.

A. The enhancement of the *Oscar Diaz'* sentence based upon the quantity of cocaine involved in the conspiracy, violated this Court's holding in ***Apprendi v. New Jersey*** where: ***(A)*** the offenses charged in the Indictment did not charge *Diaz* with an offense involving five (5) kilograms or more of cocaine in violation of 21 U.S.C. § 841, ***(B)*** the trial court did not instruct the jury to determine the quantity of cocaine, and ***(C)*** *Oscar Diaz'* sentence was enhanced from a minimum of ten (10) years to twenty (20) years based upon the trial court's factual finding that the quantity of drugs attributable to *Diaz* was five (5) kilograms or more, pursuant to 21 U.S.C. § 841(b)(1)(A) 10

B. An Indictment that does not allege the minimum quantity of drugs required under the charging statute fails to set forth an essential element of an offense, and/or violates the Fifth Amendment Due Process rights and Sixth Amendment guarantees of notice and jury trial by providing that a defendant's maximum punishment may be increased from a maximum of 10 years to 20 years imprisonment based solely upon a finding by a sentencing judge under a preponderance of the evidence standard, without notice by indictment and jury trial, that the defendant had the requisite intent necessary to establish a that he conspired to possess with intent to distribute or possessed with intent to distribute five (5) kilograms of more of cocaine 13

C. A trial court must sentence a defendant whose drug conviction violates ***Apprendi v. New Jersey*** to an offense level under the United States Sentencing Guidelines that is the lowest possible level for the drug specified in the indictment and charging statute 15

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STATEMENT OF FACTS NECESSARY FOR REHEARING

The indictment charging *Oscar Diaz* failed to allege that any specific quantity of cocaine was involved in the offenses charged.[1] (R1-22). Similarly, neither the jury instructions nor the verdict form required the jury to find that either offense involved any specific or minimum quantity of cocaine. (R1-103, 106-13-15).

At sentencing, *Oscar Diaz* vigorously objected to the quantity of cocaine, and requested a downward departure for minor role and from the career criminal enhancement. (R1-115, 117). The PSR attributed a total of 14,043 grams of cocaine to *Diaz* by arguing that the cocaine was in "plain view" or was otherwise foreseeable. *Diaz* argued that the cocaine was not in plain view, and the evidence failed to show that he had constructive possession of the cocaine, because the evidence did not show that: (1) *Oscar Diaz* observed or knew that the duffle bag that defendant Chavarry picked up during the five (5) minutes that Chavarry was in apartment 209 contained any cocaine, (2) *Oscar Diaz* entered the hallway or master bathroom of apartment 209, or observed or knew that either bathroom had cocaine secreted in the walls; (3) *Oscar Diaz* observed any cocaine inside the apartment,[2] and/or (4) the

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[1]Conspiracy to possess with intent to distribute a quantity of cocaine in violation of 21 U.S.C. § 846, and possession with intent to distribute a quantity of cocaine in violation of Title 21 U.S.C. 841(a)(1) and Title 18 U.S.C. § 2.

[2]Based upon the lower purity of the cocaine on the kitchen counter, a properly instructed

apartment was an obvious stash house. (R1-115).

However, for the purposes of sentencing, *Diaz* argued that the most that the Government could argue that he could have observed was the 994.1 grams 45% pure cocaine located on the kitchen counter - - which was approximately *half* the purity of all the other cocaine found in the bathrooms or duffle bag. (R1-114,115; R6-103-4,114-15, 137; R11-80-89).

After denying all of *Oscar Diaz'* objections except as to the fine, the District Court sentenced *Diaz* to a 20 year term of imprisonment, followed by a term of 10 years supervised release. (R2-160). *Diaz* is presently serving the 20 year sentence at FMC-Devens, Ayer, Massachusetts. (R2-160-2).

Evidence at Trial

On April 15, 1999, an officer surveilled a residence in Southwest Dade County that was "part of an ongoing investigation," and observed a dark colored Toyota Tercel parked outside. (R6-9,11). After surveilling the residence for approximately four and one-half hours, the officer observed *Oscar Diaz* exit the residence alone, with nothing in his hands, enter the Toyota and drive off to another unspecified residence where he exited empty handed, and entered for approximately ten minutes. *Diaz* then exited the residence - empty handed, and drove off in the Toyota. (R6-11-13).

The officer next surveilled *Diaz* drive to Rafael

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jury could have found that Diaz only conspired and intended to possess or attempt to possess with the intent to distribute the cut cocaine.

Morales' house (his cousin). (R6-13-14,42). When *Diaz* arrived, several individuals were standing outside of the Morales residence. *Diaz* exited the Toyota - again empty handed, and walked over and talked for a couple of minutes to Morales and Rafael Barreto. (R6-14). No officer or other witness overheard the conversation. (R6-15,44-45).

Thereafter, *Diaz* reentered the Toyota and backed out of the driveway. (R6-14). In the meantime, Morales and Barreto entered a black Acura, backed out, and followed *Diaz's* vehicle to a shopping plaza in Miami, where he parked and left it. (R6-15).

After arriving at the shopping plaza, *Diaz* exited the Toyota and walked toward the Acura. While *Diaz* walked toward the Acura, Morales and Barreto exited and walked toward two pay phones at the shopping center with *Diaz* accompanying them. (R6-15-16). No officer or other witness overheard any conversations, or observed anyone making phone calls. (R6-44-45).

Minutes later, *Diaz* walked alone over to a bakery. (R6-16,44). While *Diaz* was at the bakery, Morales and Barreto conversed. (R6-44-45). *Diaz* later exited the bakery carrying a white paper bag and a coffee cup, and joined Morales and Barreto. (R6-44-45). *Diaz* then used the pay phone while Morales sat on the curb, however, no evidence showed who *Diaz* called or what was discussed. (R6-15-16,44-45).

After approximately twenty minutes, Morales looked down at his belt buckle, removed his "pager" and showed it to *Diaz*. (R6-17-18,46). However, no pager was ever seized from Morales and no evidence showed

that the one beeper that was later found in the Fountainbleau apartment belonged to or was used by Morales, or received a call from anyone that day. (R6-17-18,185-86). During the 20 minute period before Morales allegedly received a beeper call, Morales, *Diaz*, and Barreto "were just talking amongst each other, laughing, having conversations," (R6-17), and none of the men engaged in any counter-surveillance activities. (R6-15-18).

Morales, *Diaz* and Barreto then went over to the pay phones and Morales, ***not*** *Diaz,* placed a phone call. Again, no evidence showed who Morales called or the content of the conversation. (R6-17-18).

Thereafter, Morales, *Diaz* and Barreto walked to and entered the Acura with Morales driving, Barreto in the front passenger's seat, and *Diaz* in the back seat. (R6-18-19). Morales drove the Acura back to his residence, stopped for a few minutes, and then drove to a Winn Dixie grocery store. (R6-64-65,91-92). Upon entering the parking lot, Morales drove up and down the aisles, and then stopped for several minutes next to a white Chevrolet Blazer. (R6-66-67). While stopped by the Blazer, Morales appeared to engage in a conversation with Rafael Charvarry. (R6-65-67,92-94). However, no officer or other witness overheard the conversation. (R6-66-67).

Charvarry then followed Morales to an apartment complex. (R6-67-68,95). Morales, *Diaz* and Barreto exited the Acura and walked toward an archway at the entrance of the building - empty handed. (R68-71,108). Upon reaching the archway, one of the three individuals

motioned for Chavarry to come over to the archway. *Id.* However, no evidence showed that *Diaz* motioned for Charvarry. (*Id.,* R6-81-82).

The four individuals walked upstairs and entered apartment 209. (R6-99-100). Approximately five (5) minutes after Chavarry entered the apartment, Chavarry exited the apartment complex carrying a black bag over his shoulder and a "small pinkish, bluish, flowered, printed small bag that was wrapped up in his hand." (R6-71-72, 117; Govt. Ex 7-8). After Chavarry walked to the Chevy Blazer, an officer approached, questioned Chavarry, and subsequently found seven kilo size packages of suspect cocaine in the black bag.[3] (R6-45-46,73-78).

Upon learning that kilograms of suspect cocaine were seized, officers went upstairs to the apartment and observed Barreto exit, empty handed. (R6-26-29,49). Upon searching Barreto, the officers found no drugs or money. (R6-37). The apartment door then slammed and locked, and an officer heard someone yelling "police." (R6-28-29, 51,102-03). An officer at the back of the apartment observed *Diaz* jumping from a second floor balcony, and Morales with one leg over the balcony. (R6-123-36). The officers then chased, caught, and hand-cuffed *Diaz*. (R6-32-33). Upon searching *Diaz,* the officers found <u>*no*</u> money, drugs, beepers or cell phones. (R6-37). Further, the officers never swabbed *Diaz'* hands, nor were his clothes checked to determine

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[3]The parties stipulated the bag contained 4,994 grams. (R6-77-78).

if he had any cocaine residue on them, (R6-85-86,116), and none of the evidence was fingerprinted to determine if *Diaz'* prints appeared thereon. (R6-116).

During a security sweep of the apartment, no guns, money, or drug ledgers were found. (R6-103-04, 200-01). The first officer inside the apartment, Morgan, did not testify where he observed any of the cocaine, (R6-229-30), and by the time Agent Collins entered to take the evidence in custody, the items on the kitchen counter were already seized by other individuals. (R6-184-85,197-98).

Although the majority of the cocaine was seized from the two bathrooms, the photographs showed that neither the hallway or master bathroom were visible from the living room. *See, Govt. Ex. 5-6, 8-9, Def. Sent. Ex. 1-2,5.* Further, the lack of lighting in the master bedroom when the first photographs were taken showed that neither *Diaz* nor anyone else entered the master bedroom or bathroom during the five minutes that *Diaz* was in the apartment. *Compare, Govt Ex. 8 with 9, and Def. Sent. Ex. 5 with 7.*

Moreover, one of the officers testified that the cocaine in the bathrooms was <u>*not*</u> in plain view. Detective Recio testified that he never saw the cocaine - even though at the time he entered the apartment, he knew that cocaine had been located in the bathroom, and peeked into the bathroom without looking down inside the wall. Specifically, during cross-examination, Detective Recio testified:

Q. Okay. ***Well, when you testified on direct examination, did you say that the cocaine***

wasn't visible at the time in the bathroom when you looked in there?

A. When I looked in it –

Q. Wait a minute. Answer my question.

A. Okay.

Q. ***Did you say on direct examination, when you peeked in the bathrooms, you couldn't see the cocaine like it is in the picture? Did you say that?***

A. ***Yes, I did say that.***

Q. Okay. Now, the cocaine as depicted in the walls are different than when you saw it, correct?

A. No, sir.

Q. What's different? It's not different?

A. The pictures below there, sir, where the cocaine is on there, that's what I was referring to.

Q. Oh, okay.

A. ***That those cocaine kilograms like that on the sink were not like that when I looked through.***

Q. ***Gotcha.***

A. Okay

Q. ***So, in other words, this picture was after someone took cocaine out of the wall, placed it on there and then took a photograph.***

A. ***Yes, sir.***

Q. ***Gotcha. And when you peeked in there, you said you really couldn't see the cocaine.***

A. ***No, sir.***

Q. ***Am I correct?***

A. ***Yes, sir.***

Q. Now, you already knew there was cocaine found

in there, correct?

A. Yes.

Q. You were already expecting to see cocaine in the bathroom, were you not?

A. Yes.

Q. When you went there to peek in?

A. ***Yes. I was looking around.***

Q. ***And you still couldn't see it so well in the wall, could you?***

A. ***No.***

Q. In fact, you had to walk in and look down into the wall to actually see the cocaine.

A. I couldn't answer that because I didn't do it, sir.

Q. But you didn't do that.

A. No, sir.

Q. But going to the doorway of the bathroom you couldn't see the cocaine in the wall.

A. No.

(R6-224-25). (Emphasis added).

Even when the Government attempted to rehabilitate Detective Recio on redirect examination, Recio maintained that he could not see the kilograms in the bathrooms:

Q. When you saw the cocaine in the apartment, it looked like this (indicating)? I'm pointing at -- it was placed the way it is in 5-E?

A. No, sir.

Q. Which way was it placed?

A. ***No. What I said was that when I looked into the bathroom the cocaine was not on there like this.***

Q. ***How did it look when you were in the***

bathroom?

A. ***I didn't see it like that.***

Q. Can you just describe the way it looked?

A. It was -- well, ***I didn't see it. I didn't see the cocaine.***

(R6-226-27). (Emphasis added).

As a result, the cocaine in the bathrooms clearly was not in plain view to anyone unless they (1) walked down the hall, (2) walked into the bathroom, *and* (3) looked down into the wall where a medicine cabinet would be hung.

Similarly, no testimony or evidence showed that *Oscar Diaz* saw the contents of the duffle bag that Chavarry placed in the Chevy Blazer, that the duffle bag was handed to Chavarry while *Oscar Diaz* was inside the apartment, or that the duffle bag came from inside the apartment. Moreover, no testimony or evidence indicated that *Diaz* discussed any numbers or quantities of monies, drugs or other objects, touched any of the cocaine, packaging, paraphernalia or money, had any cocaine residue on him, had any money that would indicate that he had been just involved or would be involved in any cocaine trafficking offenses, or that his fingerprints were present anywhere in the apartment where any cocaine was stored. (R6-188-89,193-98).

ARGUMENT I

IN LIGHT OF *APPRENDI V. NEW JERSEY*, 530 U.S. ___, 120 S.Ct. 2348 147 L.Ed.2d 435 (2000), THIS COURT SHOULD REHEAR THE APPELLANTS' ARGUMENT REGARDING THE DISTRICT COURT'S ERROR IN ASSESSING THAT FIVE KILOGRAMS OR MORE WERE

ATTRIBUTABLE TO *OSCAR DIAZ*, BECAUSE THE JURY MUST DETERMINE THE QUANTITY OF COCAINE BEYOND A REASONABLE DOUBT.

A. The enhancement of the *Oscar Diaz'* sentence based upon the quantity of cocaine involved in the conspiracy, violated this Court's holding in *Apprendi v. New Jersey* where: *(A)* the offenses charged in the Indictment did not charge Diaz with an offense involving 5 kilograms or more of cocaine in violation of 21 U.S.C. § 841, *(B)* the trial court did not instruct the jury to determine the quantity of cocaine, and *(C)* Oscar Diaz's sentence was enhanced from a minimum of 10 years to 20 years based upon the trial court's factual finding that the quantity of drugs attributable to Diaz was 5 kilograms or more, pursuant to 21 U.S.C. § 841(b)(1)(A).

The Supreme Court recently reversed and remanded numerous drug cases for reconsideration in light of ***Apprendi.***[4] Like the cases the court reversed, the

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[4]The following drug cases were reversed and remanded for further consideration in light of ***Apprendi: United States v. Humphrey,*** 210 F.3d 373 (6th Cir.2000)(unpublished)(trial court properly calculated of amount of cocaine), *rev'd,* 121 S.Ct. 478, - L.Ed.2d - (Nov.13, 2000); ***United States v. Whitt,*** 211 F.3d 1022 (7th Cir.2000)(sustained trial court's findings regarding quantities of drugs based upon witness testimony at trial), *rev'd*, - U.S. -, 121 S.Ct. 423, - L.Ed.2d - (Nov. 6, 2000); ***United States v. Hughes,*** 213 F.3d 323 (7th Cir. 2000)(same), *rev'd,* - U.S. -, 121 S.Ct. 423, - L.Ed.2d -

indictment in this case failed to charge the threshold amount of cocaine necessary to support the enhanced penalty provisions of the charging statute, and the jury instructions and verdict form failed to direct the jury to make a factual finding beyond a reasonable doubt as to the quantity of drugs attributable to *Diaz*. *See*, ***United States v. Slaughter,*** - F.3d - , 2000 W.L. 1946670 (5th Cir., Jan. 12, 2001)(although drug quantity should have been expressly stated in jury instructions as elements of offenses charged under 21 U.S.C. 841 and 846, such was harmless error where Indictment contained quantities of drugs and jury had a copy of the indictment during deliberations).

Moreover, the career criminal enhancement that the trial court imposed at sentencing specifically required a factual finding that five kilograms or more of the cocaine was attributable to *Oscar Diaz*. 21 U.S.C. § 841. Under ***Apprendi***, that factual finding which

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(Nov. 6, 2000); ***United States v. Smith***, 215 F.3d 1331 (7th Cir. 2000)(type and quantity of drugs sentencing factors), *rev'd*, - U.S. -, 121 S.Ct. 336, - L.Ed.2d - (Oct. 16, 2000); ***United States v. Hester,*** 199 F.3d 1287 (11th Cir.2000)(amount of marijuana involved not an element of offense that gov't had to prove beyond a reasonable doubt), *rev'd*, - U.S.-, 121 S.Ct 336, - L.Ed.2d - (Oct. 16, 2000); ***United States v. Jones,*** 194 F.3d 1178 (10th Cir. 1999)(a sentencing judge can consider quantities of drugs not charged in information or indictment or proven at trial when determining sentence, and quantities proven at trial do not dictate mandatory minimum), *rev'd*, - U.S. -, 120 S.Ct. 2739, 147 L.Ed.2d 1002 (2000).

doubled *Diaz'* sentence from 10 to 20 years, should have been determined by a jury at an evidentiary standard "beyond a reasonable doubt" – not a mere preponderance. *See,* ***United States v. Yakle,*** - F.3d -, 2001 W.L. 25719 (8th Cir., Jan. 11, 2001)(***Apprendi*** is applicable where a career offender enhancement increases the maximum applicable sentence)(unpublished). *See, Appendix.*

Based upon the facts presented at trial, a properly instructed jury could have readily found that the cocaine in the bathrooms was not in plain view, just like Officer Recio did when he testified that he saw nothing when he looked in the bathrooms. Likewise, the jury could have readily found that the drugs in Chavarry's duffle bag were not attributable to *Diaz,* because the evidence failed to show beyond a reasonable doubt that *Diaz* ever saw or knew about the cocaine in the bag. *Compare with* ***United States v. Mietus,*** - F.3d. -, 2001 W.L. 46572 (7th Cir., Jan. 22, 2001)(although ***Apprendi*** error occurred in jury instructions, no plain error occurred where no evidence showed that defendant could have been found guilty of possessing less than all of the drugs seized, and defendant did not argue that he possessed less than all the boxes containing the drugs).

Accordingly, this Court should reconsider the sentencing issues raised in *Diaz*'s briefs, and remand same for resentencing in light of ***Apprendi***.[5]

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[5]This Court's decision was entered without oral argument.

B. An Indictment that does not allege the minimum quantity of drugs required under the charging statute fails to set forth an essential element of an offense, and/or violates the Fifth Amendment Due Process rights and Sixth Amendment guarantees of notice and jury trial by providing that a defendant's maximum punishment may be increased from a maximum of 10 years to 20 years imprisonment based solely upon a finding by a sentencing judge under a preponderance of the evidence standard, without notice by indictment and jury trial, that the defendant had the requisite intent necessary to establish a that he conspired to possess with intent to distribute or possessed with intent to distribute 5 kilograms of more of cocaine.

The requirement that an indictment contain all the elements of the offense provides a defendant with notice and protection from double jeopardy. See Const. Amd V ("nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb"); Const. Amd. VI ("the accused shall enjoy the right ... to be informed of the nature and cause of the accusation"). An indictment also "limit[s] [the defendant's] jeopardy to the offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." ***Stirone v. United States,*** 361 U.S. 212, 218, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960). Furthermore, the Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is

charged." ***In re Winship,*** 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

Recently, the Second Circuit examined this issue in the context of the federal firearm statute where the defendants plead guilty to the simple firearms offense, but were enhanced one conviction for discharge of a firearm and imposed a 10 year consecutive sentence for violation of § 924(c) in connection with a different bank robbery. Instead of merely reversing for resentencing, the court remanded for resentencing or reindictment. ***United States v. Tran,*** - F.3d -, 2000 W.L. 1701651 (2d Cir., Nov. 15, 2000). The indictments in ***Tran*** charged the defendants with a simple § 924(c) firearms offense, to which the defendants plead guilty. *Id.* at 10. Recognizing that the notion that an indictment is a prerequisite to jurisdiction over a criminal case in the federal courts is long established, the Second Circuit held that the district court acted outside its jurisdiction in sentencing the defendants for the enhanced firearms offenses not charged in their indictments. ***Tran,*** at 6, 10, *citing,* ***Ex parte Bain,*** 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887)(indictment found by a grand jury indispensable to the power of the court to try defendant for crime charged).

Similarly, the indictment the grand jury returned against *Oscar Diaz* in the instant case, failed to set forth any notice that the enhanced penalty provisions of § 841 by specifying the quantity of cocaine that the grand jury charged *Diaz* with. Accordingly, the district court was without jurisdiction to try or sentence *Diaz,* because the grand jury did not charge *Diaz* with an essential element

of the offense charged.

C. A trial court must sentence a defendant whose drug conviction violates *Apprendi v. New Jersey*, to an offense level under the United States Sentencing Guidelines that is the lowest possible level for the drug specified in the indictment and charging statute.

In instances such as the instant case where the Indictment fails to allege the penalty provision which would provide the trial court with jurisdiction to impose a minimum mandatory sentence or the quantity of drugs specified in said statute then the trial court is without jurisdiction to sentence (as well as convict), the defendant.

In the event this Court does not rule that the indictment must be dismissed, the *Oscar Diaz* submits that inasmuch as the petit jury found him guilty of a cocaine conspiracy for an unstated quantity of cocaine, that the trial court would only have authority to sentence him to the lowest quantity of cocaine specified in the United States Sentencing Guidelines. Accordingly, *Diaz* respectfully submits that the highest base offense level applicable, would be at level 12.

CONCLUSION

Based on the foregoing reasons and authorities, *Oscar Diaz,* respectfully requests that this Court rehear the matters raised herein.

Respectfully submitted,

RHONDA A. ANDERSON, ESQ.

CERTIFICATE OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that a true and exact copy of the foregoing Reply Brief containing 3,561 words (including all headings) was mailed this 1st day of February, 2000, to: ***Madeleine R. Shirley, Esq.,*** Assistant U. S. Attorney, Chief-Appellate Division, Office of the U. S. Attorney, 99 N.E. Fourth Street, Miami, Florida 33132.

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-15009-GG

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

OSCAR DIAZ,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Florida

February 27, 2001

Before: BIRCH, BARKETT and HULL, Circuit Judges.

PER CURIAM:

The petition for rehearing filed by Appellant, Oscar Diaz is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

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